BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 15-11

IGOR OVCHINNIKOV, IRINA RZAEVA, and DENIS NEKIPELOV,

– vs. –

MICHAEL HITRINOV a/k/a
MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.

INFORMAL DOCKET NO.: 1953(I)

KAIRAT NURGAZINOV,

– vs. –

MICHAEL HITRINOV a/k/a
MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.

COMPLAINANTS' RESPONSE TO RESPONDENTS' MOTION TO STRIKE COMPLAINANTS' SHIPPING DOCUMENTS

Pursuant to 46 C.F.R. §§ 502.69 and 502.71, Complainants, through their Counsel, Marcus A. Nussbaum, Esq., hereby file this Response to Respondents' Motion to Strike Complainants' Shipping Documents.

BRIEF STATEMENT

Respondents' incomprehensible Motion to Strike Complainants' Shipping Documents is entirely frivolous and completely lacking in substance or supporting argument. Further, said motion was obviously interposed for no other reason than to vex, annoy, and harass Complainants and their counsel; and as a contrivance calculated *solely* to distract Complainants from responding

to Respondents' co-terminously filed motions, which as of the time of this writing have been separately responded to.

Additionally, Respondents' frivolous motion is *completely devoid* of a single case citation or reference to *any* statute, Federal Rule, or local rule of the Commission; and is instead comprised exclusively of wild-eyed and reckless accusations, rank speculation, mere surmise, and utter conjecture.

Respondents have further made very serious allegations against Complainants' counsel of "fraud", "fabrications", "fakes", and "manipulated documents"; all of the foregoing supported by *nothing* other than an attorney's affirmation, and a self-serving Declaration of individually named Respondent Mr. Hitrinov, absent an Affidavit from *any* expert in forensics or *any* other appropriate discipline.

Consequently, and in light of the above, upon the Presiding Officer's denial of Respondents' frivolous motion, Complainants will petition the Presiding Officer to have the scurrilous accusations contained in Respondents' frivolous motion to which Complainants are now compelled to respond to, as well as Complainants' Response and any forthcoming Reply of Respondents to be *sealed*; for the Presiding Officer to strongly admonish Respondents' counsel by Mr. Jeffrey and Ms. Vohra; and to impose such monetary sanctions, fines, or other disciplinary action as the Presiding Officer may see fit.

NATURE OF THE CASE

This action arises out of Respondents' numerous violations of the Shipping Act of 1984, 46 U.S.C. §40101 et seq., in that after Respondents had shipped certain automobiles owned by Complainants from the United States to Kotka, Finland, where they were to have been released to Complainants as purchasers, said automobiles were instead converted, sold, and unlawfully

released by Respondents to third parties at a location owned by or within Respondents' control. Additionally, Respondents unlawfully exercised maritime liens against Complainants' automobiles.

RELEVANT PROCEDURAL HISTORY

On November 24, 2015 the Presiding Officer issued Initial Orders in the above captioned matters having been consolidated by Order of May 24, 2016, which required, *inter alia*, that the parties 'meet and confer' to establish a schedule for completion of discovery; prepare a joint status report regarding same; and exchange initial disclosures within seven days of the filing of Respondents' Answer herein.

Additionally, the Presiding Officer *sua sponte* issued Orders to File Shipping Documents in the above captioned matters, dated April 27, 2016 (the "Orders") which specifically directed the parties to serve and file with the Commission on or before May 2, 2016 for Informal Docket No.: 1953(I), and on or before May 4, 2016 for Docket No.: 15-11, all records relating to the ocean transportation of the subject automobiles, "…including, but not limited to, quotes of freight rates for transportation, shipping agreements, booking confirmations, bills of lading, dock receipts, invoices, payments for transportation, Certificates of Title, export and import declarations, notices of arrival, and any other documents relating to the shipment of the vehicles." Significantly, the Presiding Officer did *not* direct the disclosure of any facts or circumstances regarding the procuring or *communication* of said documents which Respondents now improperly seek to obtain. In compliance with the Presiding Officer's Orders, Complainants filed their shipping documents with the Commission on May 2, 2016, and May 4, 2016 respectively.

Thereafter, and by email of May 25, 2016, counsel for Respondents requested that "…Complainants provide electronic copies of all of the shipping documents Complainants submitted to the Presiding Officer." (See Appendix "A")

In a subsequent email sent less than forty-eight (48) hours later counsel for Respondents sent a second email on May 27, 2016 wherein counsel "cut and pasted" Respondents' initial request filed less than forty-eight (48) hours earlier. (See Appendix "B")

On May 27, 2016 Complainants responded to Respondents' duplicative and redundant emails advising that the discovery sought: (1) violated the attorney-client privilege; (2) constituted attorney-work product; and (3) otherwise constituted materials prepared in anticipation of litigation. (See Appendix "C")

On June 22, 2016 Respondents filed their instant ill-founded motion, to which Complainants now respond hereto.

STATEMENT OF FACTS

Complainants respectfully rely upon findings of fact made by the Presiding Officer in his Notice of Default and Order to Show Cause of March 30, 2016, and do incorporate same by reference and make a part hereof as if more fully set forth herein.

ARGUMENT

Respondents' Unsupported "Arguments"

Respondents have based their instant ill-founded and frivolous motion upon alleged 'evidence' "…that at least some of the 'shipping documents' [sic] are nothing more than fraudulent fabrications" (emphasis added).

Respondents have further alleged "…that at least some of those documents are fraudulent" to the extent that Respondents 'believe' that certain documents were "doctored" by the use of a

scanner "…to appear as an original". Needless to say, Respondents have not submitted a shred of evidence to support their outrageous allegation other than their own misguided "belief".

Notwithstanding Respondents' extraneous reference to their separately filed Motion for Judgment on the Pleadings, inclusive of a self-serving Declaration by individually named Respondent, Mr. Hitrinov, *conspicuously absent* from Respondents' motion papers is *any* Affidavit by either a forensics expert or other qualified individual to support the false and didactic pronouncements of Mr. Hitrinov and his counsel.

As to Respondents' reference to invoices from one "Global Auto Enterprise", it is noted at the outset that *no such entity exists* other than in the frivolous arguments and false representations of Mr. Hitrinov and his counsel. Indeed, and as Respondents are well aware, the actual entity listed as seller of the subject vehicles in numerous documents is "Global Auto Inc." ("Global"). Conspicuously and conveniently *absent* from Respondents' instant frivolous motion is *any* Affidavit or declaration by the Principal of Global and creator of the invoices, Sergey Kapustin. Needless to say, Complainants are unable to opine (as neither are Respondents-movants) as to *how* or *why* Mr. Kapustin may have included certain language in some invoices, but not in others. While such inquiry *may* arguably be the subject of a deposition of Mr. Kapustin, needless to say the foregoing *cannot* reasonably be construed to constitute "manipulated documents" or "obvious or apparent fakes" as recklessly and baselessly propounded by Respondents in their instant frivolous motion.

Succinctly stated, not only have Respondents *abjectly failed* to set forth *any prima facie* argument supporting their outrageous allegations, but have further and correspondingly *abjectly failed* to address *any* of Complainants' well-founded arguments that the discovery sought: (1) falls within the attorney-client privilege; (2) is attorney work product; and (3) constitutes material

prepared for litigation. In lieu of interposing *any argument* <u>*whatsoever*</u> in response to said arguments, Respondents instead lamely proffer "…it is hard to see how [these] claim[s] could be valid unless counsel created the documents and/or provided the documents to Complainants instead of collecting the documents from them". Clearly, Respondents' counsel, obviously being grossly unfamiliar with the law pertaining to these areas, is uniquely unqualified to proffer any argument in opposition to same, else surely such argument would have been interposed. Additionally, and having failed to even reference or address, let alone distinguish or oppose Complainants' arguments on these issues inclusive of the controlling case law cited therein, such arguments can only reasonably be construed by the Presiding Officer to have been admitted and conceded by Respondents.

Further, and least Respondents try to cure the gross insufficiencies of the "arguments" (or more properly, the lack thereof in their instant frivolous motion) by interposing arguments in any forthcoming Reply to their instant frivolous motion not originally set forth therein and absent any good cause shown for having failed to do so, it is respectfully submitted that the Presiding Officer must *reject* any such lately interposed arguments as *untimely*, and/or grant Complainants leave to interpose a sur-reply thereto.

For all these reasons, together with that which is set forth below, it is respectfully submitted that Respondents' instant frivolous motion *should be denied in its entirety,* <u>*with prejudice*</u>.

<u>The Material Sought By Respondents Is Not Discoverable</u>

Standard of Review

Federal Rule of Evidence ("FRE") 403 states, in relevant part, as follows:

> "The [C]ourt may exclude relevant evidence if its *probative value is substantially outweighed* by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Federal Rules of Civil Procedure ("FRCP") 34(b)(2)(D) and (E) states, in relevant part, as follows:

> (D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.
>
> (E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
>
> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
>
> (iii) ***A party need not produce the same electronically stored information in more than one form***. (emphasis added)

Respondents' Demand For 'Native' Electronic Documents

Respondents herein have sought discovery of "native" electronic documents.

In so doing, and through the pretext and false purpose of obtaining documents previously provided, Respondents have cannily and improperly as their true purpose, sought to obtain ancillary information regarding how, by what means, and through whom such documents came to be in Complainants' possession; how such documents were conveyed, and when; and who created said documents.

As set forth below, Respondents, whether through direct frontal assault, or by collateral attack via subterfuge, are not entitled to the "native" information sought.

Attorney-Client Privilege

It is well settled that the attorney-client privilege covers "…[c]onfidential communications between an attorney and client made because of that relationship and concerning the subject matter of attorney employment." See, Commonwealth v. Edwards, 235 Va. 499, 508-09 (1988); (citing Grant v. Harris, 116 Va. 642, 648 (1914); see also, United States v. O'Malley, 786 F.2d 786, 794 (7th Cir.1986); (the privilege attaches not to the information but to the communication of the information).

It is respectfully submitted that the above cited case law is directly 'on point' with respect to the discovery sought by Respondents herein to the extent that Respondents undeniably and inarguably are seeking not the "information" itself which has already been provided under separate cover, but rather "the *communication* of the information" squarely within the meaning of United States v. O'Malley, supra.

Attorney Work-Product

Under the attorney work-product doctrine, materials prepared in anticipation of trial by a party or its agent are not discoverable unless the discovering party can show a substantial need for the materials. Fed. R. Civ. P. 26(b)(3).

Pursuant to FRCP 26(b)(3)(A), materials consisting of "documents or tangible things" which were prepared in anticipation of litigation by a representative of a party are protected from disclosure as constituting attorney work product. See also, AKH Co. v. Universal Underwriters Ins. Co., 300 F.R.D. 684 (D. Kan. 2014).

It is well settled that the attorney-work product privilege covers material that "can fairly be said to have been prepared or obtained because of the prospect of litigation." See, In re Sealed Case,146 F.3d 881, 884 (D.C.Cir.1998). It is equally well settled that the privilege's purpose is to

protect the adversarial trial process by insulating attorneys' preparations from scrutiny. See, Judicial Watch, Inc. v. Dep't of Homeland Sec., 926 F.Supp.2d 121, 142 (D.D.C.2013) (quoting Jordan v. Dep't of Justice, 591 F.2d 753, 775 (D.C.Cir.1978); ("[T]he purpose of the privilege is to encourage effective legal representation within the framework of the adversary system by removing counsel's fears that his thoughts and information will be invaded by his adversary." (emphasis in original)). Accordingly, the attorney work-product privilege "should be interpreted broadly and held largely inviolate." See, Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 369 (D.C.Cir.2005).

The Materials Sought By Respondents Are Not Subject To The Presiding Officer's Orders Of April 27, 2016

In the case at bar, it is undisputed by Respondents that they have been provided with documents responsive to, and in full compliance with the Presiding Officer's Orders. Respondents now, however, have sought to go beyond the directives of the Presiding Officer's Orders by obtaining not the documents themselves, but information concerning how the documents came to be in the possession of Complainants and their counsel which implicitly and unavoidably includes (1) communications between Complainants and their counsel; (2) communications and investigations relating to the procuring of said documents as part of the instant litigation; and (3) identification of individuals who participated in this process. Needless to say, the Presiding Officer's Orders run only to the production of the documents themselves, and *not* to the details and circumstances regarding the procuring of same which are undeniably afforded the protections against such disclosures set forth above.

CONCLUSION

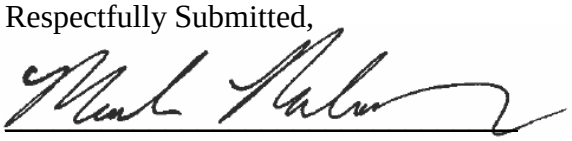
It is respectfully submitted that as set forth above, Respondents have abjectly failed to set forth prima facie entitlement to the discovery no sought, in that such discovery was not any part of the Presiding Officer's Order directing filing of shipping documents and is otherwise protected by attorney-client privilege, the attorney work product doctrine and material prepared for litigation; all of which were roundly ignored in Respondents' instant frivolous motion.

Additionally, individually named Respondent, Mr. Hitrinov, who is and has been the subject of numerous litigations (and undoubtedly many more to come) is reknown for brow beating his attorneys into making repeated outrageous and unsupported claims of fraud, alteration of documents, manipulation of documents, and other related baseless accusations, combined with unending efforts to pierce the attorney-client privilege and other related protections, and demanding forensic inspections of attorneys' computers, files, and other intrusive discovery upon no good faith basis whatsoever, of which Respondents' instant ill-founded motion is a prime example of such bad faith litigation practices. Accordingly, and based upon the foregoing it is respectfully submitted that Respondents instant frivolous motion be denied in its entirety with prejudice; that the Presiding Officer seal all submissions on this motion based upon the scurrilous and unsupported accusations of Mr. Hitrinov and his counsel; and that the Presiding Officer strongly admonish Mr. Hitrinov and his counsel against any such further frivolous motion practice and impose sanctions, fines, and any such other action that the Presiding Officer may see fit.

WHEREFORE, it is respectfully requested that the Presiding Officer now deny Respondents' instant motion in its entirety, together with such other and further relief as the Presiding Officer may deem just and proper under the circumstances.

Dated: June 29, 2016
Brooklyn, New York

Respectfully Submitted,



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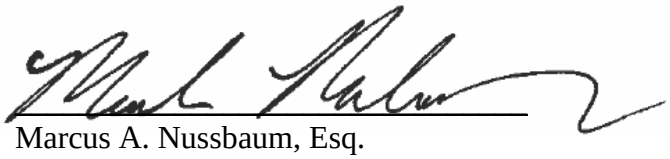
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANTS' RESPONSE TO RESPONDENTS' MOTION TO STRIKE COMPLAINANTS' SHIPPING DOCUMENTS**

upon Respondents' Counsel at the following address:

Nixon Peabody LLP
Attn: Eric C. Jeffrey, Esq.
799 9th Street NW, Suite 500
Washington, DC 20001-4501

by first class mail, postage prepaid, and by email (ejeffrey@nixonpeabody.com).



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Dated: June 29, 2016 in Brooklyn, New York.